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SERVICE DATE - JUNE 30, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-838

EAST ST. LOUIS JUNCTION RAILROAD COMPANY
– ADVERSE ABANDONMENT –
IN ST. CLAIR COUNTY, IL

STB Docket No. AB-33 (Sub-No. 199)

UNION PACIFIC RAILROAD COMPANY
– ADVERSE DISCONTINUANCE –
IN ST. CLAIR COUNTY, IL

Decided: June 26, 2003

This decision grants in part the Illinois Department of Transportation's (IDOT) exemption and waiver requests.

By petition filed on February 14, 2003, IDOT asks for exemptions from various statutory provisions governing rail line abandonments, and for waiver of several of the Board's related regulations. The exemptions and waivers would, if granted, facilitate IDOT's intended filing of an application in which it would seek a finding that the present or future public convenience and necessity (PC&N) require or permit the abandonment of, and discontinuance of rail service over, a rail line in St. Clair County, IL. According to IDOT, the line in question is owned by East St. Louis Junction Railroad Company (ESLJ), and Union Pacific Railroad Company (UP) operates over it. The petition will be granted to the extent specified in this decision.

BACKGROUND

IDOT is in the process of rebuilding, relocating, and elevating portions of Illinois Route 3, a roadway in East St. Louis, IL, that parallels the Mississippi River. In connection with that construction project, IDOT is planning to construct new access and exit ramps to Interstate Highways I-55, I-64, and I-70, once those highways are relocated to a new bridge crossing of the Mississippi River. This highway construction project is part of a planned major expansion and improvement of area highway infrastructure that would promote the flow of roadway traffic in East St. Louis, and, more generally,

between East St. Louis and St. Louis, MO. IDOT asserts that a line owned by ESLJ in the vicinity of the Route 3 project must be removed if the State of Illinois is successfully to complete the planned highway improvements. According to IDOT, ESLJ has declined voluntarily to abandon the line in question and does not consent to its relocation. Consequently, IDOT intends to ask the Board to find that the PC&N requires or permits the Board to remove its jurisdiction over the line by way of an “adverse” (or third-party) abandonment proceeding pursuant to 49 CFR 1152.1 et seq., so that IDOT may pursue whatever legal rights it may have under state law to force divestiture of the rail lines in question.

In its petition, IDOT says that it plans to seek the abandonment of (and discontinuance of UP’s operations over) ESLJ’s 7.56-mile line between milepost 0.0 and milepost 7.56 located within the National Stock Yards in St. Clair County. While it acknowledges that the subject rail line is active and serves shippers, IDOT claims that no shipper would lose rail service as a result of the abandonment it intends to seek.¹

In the petition, IDOT announced its intention to file a third-party abandonment and discontinuance application, and requested waivers and exemptions designed to eliminate its need to file certain information that is required for a typical abandonment application, i.e., one brought by the carrier that owns and operates the line proposed for abandonment. In general, IDOT maintains that the information in question is irrelevant or inapplicable to adverse abandonment proceedings.

DISCUSSION AND CONCLUSIONS

Exemptions. Pursuant to 49 U.S.C. 10502, IDOT seeks exemption from the requirements of 49 U.S.C. 10903(a)(3)(A), (B) and (E). Specifically, IDOT seeks relief from section 10903(a)(3)(A), which requires that the abandoning party serve notice of the application on the chief executive officer of each affected state.² IDOT asserts that, as a state agency, service of such notice on other representatives of the State of Illinois (including the governor) would be unnecessary and redundant. The exemption will be granted.

¹ IDOT states that, if the abandonment it seeks is effectuated, the shippers in question will be able to receive service from other rail carriers. It indicates, however, that the proposed abandonments may result in the shippers losing access to the incumbent carrier (UP).

² IDOT also seeks a waiver from the corresponding regulatory provision at 49 CFR 1152.20(a)(2)(ii).

IDOT seeks an exemption from 49 U.S.C. 10903(a)(3)(B), which requires posting notice of the proposed action in each terminal and station on each railroad line proposed to be abandoned.³ Section 10903(a)(3)(B) generally is inapplicable in third-party abandonments, because it is designed for rail carriers that propose voluntarily to discontinue their own service over a line.⁴ The sought exemption will therefore be granted.

IDOT requests an exemption from 49 U.S.C. 10903(a)(3)(E), involving the requirement of an affidavit certifying compliance with the provisions of sections 10903(a)(3)(A)-(D).⁵ A complete exemption from this provision is unwarranted because IDOT neither sought nor obtained an exemption from section 10903(a)(3)(C) and (D). Even if considered as a request for a partial exemption from section 10903(a)(3)(E), such an exemption is still unnecessary because the exemptions from 10903(a)(3)(A) and (B) serve to “satisfy” the applicant’s obligations under those provisions. Accordingly, pursuant to section 10903(a)(3)(E), IDOT need only certify compliance with the requirements of section 10903(a)(3)(C) and (D).

IDOT seeks exemption from 49 U.S.C. 10903(c) – the provision requiring all rail carriers to maintain a system diagram map and to identify on that map rail lines planned for abandonment or discontinuance of service.⁶ Compliance with this requirement usually is not feasible for a third-party applicant, particularly for a non-railroad entity that does not operate over the lines in question.⁷ An exemption from this provision therefore will be granted, as is customary in such proceedings. See, e.g., Canadian National Railway Company – Adverse Discontinuance – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, ME, STB Docket No. AB-279 (Sub-No. 3) (STB served Sept. 25, 2002) (Canadian National); New York City Economic Development Corporation – Adverse Abandonment – New York Cross Harbor Railroad, Inc., STB Docket No. AB-596 (STB served Dec. 3, 2001) (New York City).

³ IDOT also seeks a waiver from the related regulatory provision at 49 CFR 1152.20(a)(3).

⁴ Also, as IDOT points out, it does not have access to such facilities. February 14 petition at 4.

⁵ IDOT also seeks a waiver from the related regulatory provision at 49 CFR 1152.24(b).

⁶ Although IDOT does not so specify, the request evidently pertains to section 10903(c)(2).

⁷ It is unclear from the petition whether IDOT is a rail carrier subject to Board jurisdiction. If it is not, then the provisions of section 10903(c) are inapplicable, since they apply only to rail carriers. See Napa Valley Wine Train, Inc. – Adverse Abandonment – In Napa Valley, CA, STB Docket No. AB-582 (STB served Mar. 30, 2001) (Napa Valley), slip op. at 3, n.6.

IDOT also seeks exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 (and waiver of the related regulations at 49 CFR 1152.27). In a third-party abandonment proceeding, the Board withdraws its primary jurisdiction to permit state, local, or other federal law to take effect where there is no overriding federal interest in interstate commerce. See Kansas City Pub. Ser. Frgt. Operations – Exempt – Aban., 7 I.C.C.2d 216, 225 (1990); Modern Handcraft, Inc. – Abandonment, 363 I.C.C. 969, 972 (1981) (Modern Handcraft). Absent an exemption from 49 U.S.C. 10904, that provision would provide a vehicle for someone to invoke jurisdiction that the agency had just disavowed. If the Board finds that the public convenience and necessity require or permit withdrawal of its jurisdiction, it would be fundamentally inconsistent to allow anyone to invoke section 10904, and thereby nullify the Board's decision. Therefore, IDOT's petition for exemption from section 10904 will be granted.

Finally, IDOT asks for an exemption from the public use procedures of 49 U.S.C. 10905 (and waiver of the related regulations at 49 CFR 1152.28). Were the Board ultimately to grant IDOT's application (which focuses on the conversion of the subject rail property for public purposes), and also allow for the subsequent filing of additional public use requests, such action would delay the withdrawal of Board jurisdiction for no meaningful purpose. For that reason, the exemption will be granted.

Application of these five statutory provisions – 49 U.S.C. 10903(a)(3)(A) and (B), 49 U.S.C. 10903(c)(2), 49 U.S.C. 10904, and 49 U.S.C. 10905 – to the proposed transaction is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. Rather, the exemptions will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

Waivers. Like the ICC, the Board ordinarily would reject an abandonment application that does not substantially conform to the requirements of 49 CFR 1152 Subpart C. However, in appropriate instances, particularly involving adverse applications, the Board will waive inapplicable and unneeded provisions.⁸ Citing past waiver cases, IDOT requests waiver of the following specific

⁸ See, e.g., Canadian National; New York City; CSX Corporation and CSX Transportation, Inc. – Adverse Abandonment Application – Canadian National Railway Company and Grand Trunk Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Mar. 2, 2001, and Feb. 1, 2002); The Kansas City Southern Railway Company – Adverse Discontinuance Application – A Line of Arkansas & Missouri Railroad Company, STB Docket No. AB-103 (Sub-No. 14) (STB served Nov. 24, 1998) (Kansas City Southern); City of Rochelle, Illinois – Adverse Discontinuance – Rochelle Railroad Company, STB Docket No. AB-549 (STB served June 5, 1998) (City of Rochelle); (continued...)

provisions of 49 CFR 1152, Subpart C: 1152.20(a)(2)(ii), (iii), and (iv) [notice to state officials and agencies]; 1152.20(a)(3) [posting requirements]; 1152.21 [notice of intent to abandon]; 1152.22(a)(5) [system diagram map]; 1152.22(b) [condition of properties]; 1152.22(c) [service provided]; 1152.22(d) [revenue and cost data]; 1152.22(e) [rural and community impact]; 1152.22(i) [federal register notice]; 1152.24(b) [affidavit of compliance]; 1152.24(c) [service and posting of the application]; 1152.24(e)(1) [rejection/discontinuance of non-conforming application]; 1152.27 [financial assistance procedures]; 1152.28 [public use procedures]; and 1152.29 [trail use/rail banking].⁹

Several of the regulations from which IDOT seeks waiver – sections 1152.20(a)(3), 1152.22(a)(5), 1152.27, and 1152.28 – are counterparts to statutory provisions from which IDOT is being granted exemptions. Consistent with those exemptions, the corresponding regulatory provisions will be waived. For the same reasons and to the same extent that certain exemptions from provisions of 49 U.S.C. 10903(a)(3) were granted, a waiver will also be granted of the notice, service, posting, and certification requirements of 49 CFR 1152.20(a)(2)(ii), (iii), and (iv), and 1152.24(c). The affidavit of service and publication requirements of 49 CFR 1152.24(b), however, will continue to apply to the balance of section 1152.20.

IDOT asks the Board to waive the regulations at 49 CFR 1152.22(b)-(e), asserting that it lacks sufficient information adequately to satisfy these requirements. In recent adverse abandonment and discontinuance cases, the Board has waived the regulations at section 1152.22(b)-(d), noting that provisions pertaining to the condition of the rail lines, the service provided over them, and revenue and cost data involve information that is generally not available to the applicant and is irrelevant in these

⁸(...continued)

Grand Trunk Western Railroad Incorporated – Adverse Discontinuance of Trackage Rights Application – A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, STB Docket No. AB-31 (Sub-No. 30) (STB served Feb. 12, 1998) (Grand Trunk Western); David H. Murdock d/b/a Murdock Investment Company – Abandonment – Consolidated Rail Corporation Line in Baltimore, MD, Docket No. AB-167 (Sub-No. 1102) (ICC served Aug. 6, 1992); and Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served July 12, 1989).

⁹ IDOT originally sought waiver from 49 CFR 1152.20(c) [Environmental and Historic Reports] and 1152.22(f) [environmental impact]. By letter dated June 3, 2003, IDOT now advises that, on the basis of consultation with representatives of the Board’s Section of Environmental Analysis, it no longer seeks a waiver from either provision, and that it is preparing and will file Environmental and Historic Reports in connection with the proposed abandonment.

circumstances.¹⁰ See, e.g., New York City, slip op. at 2. Thus, application of the regulations at 49 CFR 1152.22(b)-(d) will be waived.

Under 49 U.S.C. 10903(d), the Board is required to consider adverse impacts on rural and community development, which may arise in both adverse and traditional abandonments. Such information may be particularly relevant where the abandonment could result in the loss of rail competition and the disruption of rail service. Cf. Canadian National at 6. IDOT's request for a waiver from providing information as to rural and community impact pursuant to 49 CFR 1152.22(e) will therefore not be granted. While IDOT will have to make additional effort to obtain the required information, it is appropriate for it to do so under the circumstances. Of course, some of the information required under 1152.22(e) should be in the railroads' possession and would be difficult for IDOT to obtain elsewhere. Because this information is relevant and, in all likelihood, is most easily obtained from the railroads, ESLJ and UP are directed to cooperate with IDOT by providing it with shipper and traffic data in their possession that will aid IDOT in satisfying the requirements of 49 CFR 1152.22(e)(2).

IDOT asks that the Board waive the requirements of 49 CFR 1152.21 (notice of intent to abandon) and 49 CFR 1152.22(i) (draft Federal Register notice) to permit it to deviate from the prescribed forms of notice as set forth in the regulations. While portions of the prescribed text in both regulations – specifically, language concerning the system diagram map, offers of financial assistance and subsidy, and public use conditions – can be amended consistent with the exemptions and waivers granted above, applicants should otherwise adhere as closely as possible to the prescribed text.¹¹ IDOT's proposed revisions reach beyond the scope of the exemptions and waivers it has been granted, and it has omitted, among other things, prescribed text outlining the rights of parties to participate in the proceeding and the means by which they may do so. Therefore, while there is a basis for granting IDOT

¹⁰ If the Board were to require IDOT unnecessarily to comply with the provisions of 49 CFR 1152.22(b)-(d), the Board could indirectly encourage the use of discovery against incumbent railroads – the parties likely to have the most complete and detailed information on the subject matter. Such a result conflicts with the Board's general policy of disfavoring discovery in abandonment proceedings. See, e.g., Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (STB served Jan. 11, 2002), slip op. at 1-2; Central Railroad Company of Indiana – Abandonment Exemption – In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served Apr. 1, 1998), slip op. at 4.

¹¹ IDOT should advise the public in its notices that offers of financial assistance and public use conditions are *not* available in this proceeding, rather than excise all reference to these procedures as IDOT would do. Such notice would not only more fully advise the public of the procedures and options specifically available and unavailable to it, but will also better enable interested parties to comment on the public benefits or harms that could flow from the proposed abandonment.

waivers from 49 CFR 1152.21 and 1152.22(i) to permit it to file notices that do not follow the prescribed forms to the letter, IDOT's proposed text for both notices is not adequate.¹²

IDOT seeks a waiver of 49 CFR 1152.24(e)(1), which permits the Board to reject any abandonment application that does not substantially conform to Board regulations. Apparently, IDOT is concerned that the Board might find that its application does not conform with the applicable regulations due to the exemptions and waivers granted in this decision. However, the Board would not and does not find "substantial" non-conformance with its abandonment regulations to exist where the applicant's non-conformance merely tracks the waivers the applicant has requested and received. The waiver IDOT seeks is therefore unnecessary.

Finally, IDOT seeks waiver of the trail use/rail banking regulations at 49 CFR 1152.29. It is not necessary to reach the issue at this time. The requested waiver can be addressed, if necessary, in a future decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for exemption and waiver is granted to the extent specified in this decision.
2. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

¹² It would be helpful if IDOT and future potential applicants seeking to deviate from the notice forms prescribed at 49 CFR 1152.21 and 1152.22(i) would identify in advance the particular language that they seek to remove, add, or revise, so that the significance of the proposed changes can be more readily assessed. For example, a highlighted version of the notice depicting new, revised, or eliminated text would be most helpful.